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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH EUGENE BERMAN,

Defendant and Appellant.

C083883

(Super. Ct. No.
SCCRCRF20164491)

A jury found defendant Joseph Eugene Berman guilty of sexual penetration of a child under the age of 10 years and lewd and lascivious acts on a child under the age of 14 years. The trial court sentenced him to 15 years to life in prison.

In his appellant's opening brief, defendant claimed the trial court's improvised amplification of the reasonable doubt jury instruction violated due process. Considering the instructions as a whole, we conclude there is no reasonable likelihood the jury applied the instruction in an unconstitutional manner.

Defendant further asserted, in a petition for rehearing, that he is entitled to remand for a determination of his ability to pay the fine and fees imposed by the trial court. We will remand the matter for a determination of defendant's ability to pay the fine and fees

imposed by the trial court and otherwise affirm the judgment. We will also direct the trial court to correct a clerical error in the abstract of judgment.

BACKGROUND

Prior to trial, the parties discussed whether the prosecutor could use a box as a prop during closing argument. The record indicates the trial judge had observed the prosecutor use the prop in prior cases. The prosecutor wanted to use slips of paper (representing testimony) and place them in a box (representing the trial). Defense counsel did not want the prosecutor to ask the jury if it would require the prosecutor to “fill the box.” Defense counsel said the volume of paper compared to the volume of the box would denigrate the burden of proof. But defense counsel did not object to the prosecutor using the box as a way to demonstrate the jury could not consider anything not presented at trial.

The trial court said the box was useful in explaining that the jury could only consider evidence presented at trial. The trial court ruled the prosecutor could use the box for that purpose and must not use the box in a way that lessened the burden of proof. During voir dire, both attorneys utilized the analogy of the box to discuss what information jurors could consider.

After the jury was sworn, the trial judge lost her voice and another judge presided on a temporary basis. The temporary judge provided the initial instructions to the jury using standard jury instructions, including the People’s burden of proof beyond a reasonable doubt. (CALCRIM Nos. 101, 103, 104, 105.)

When the regularly-assigned trial judge returned, she made further comments to the jury regarding reasonable doubt. The trial judge referenced the box analogy and said, “it’s important that you understand that the evidence you hear in this courtroom is the equivalent of the evidence that goes into that box.”

The trial judge added: “So if you don’t hear it in this courtroom, it doesn’t go into that box. Now, when you stop and you start to consider the evidence, that means when

you take that box figuratively into the courtroom, or into the jury deliberation room, you are going to be looking at each piece of evidence, and you are going to have to determine whether that evidence sounds reasonable or plausible to you and if it doesn't.

"If it does, you put it in the part of your pile that says we are going to look at this evidence as reasonable evidence. If it doesn't sound reasonable to you, it sounds like somebody is misunderstanding or misrepresenting, you put it over into the other pile, the stuff you are not going to listen to.

"When you then start to look at the pile of evidence that came out of that box that you think is reasonable, then you have to determine whether that evidence demonstrates beyond a reasonable doubt that [defendant] is guilty.

"And the reason I'm going into this is because I don't want you to be confused about trying to consider whether a piece of evidence is reasonable or not and confuse that with your duty of looking at all of the reasonable evidence and determining whether that evidence is sufficient beyond a reasonable doubt.

"All right. So reasonable doubt is that doubt, that -- that state of mind when considering all of the evidence you don't think that there is any reasonable doubt that [defendant] is guilty.

"Now, if the evidence that you consider is good evidence, or reasonable evidence, if after considering that you think, you know, I'm not convinced beyond a reasonable doubt, I still think that there is a doubt here, and I think that it's not just a figurative doubt, I think that it is a reasonable doubt, then you have to find that [defendant] is not guilty and he is to be acquitted.

"I'm going to be going over that as often as you need. If you have any questions at all about reasonable doubt, about any of the instructions, please let us know and we'll go over that information again.

"The other thing, and I promise it's the last thing, and that is the concept of -- of presumption of innocence. Once more, I'm going to hammer this one in and -- and it

may be you get tired of hearing it, but [defendant], if you were to go in to deliberation right now, and I were to tell you to come back with a verdict, you would have to come back with a verdict of not guilty. And the reason for that is you haven't heard any evidence that would convince you that he is guilty. As long as the evidence does not rise to the beyond-a-reasonable-doubt level, [defendant] is not guilty and he has to be acquitted."

After the close of evidence, the trial court instructed the jury with standard jury instructions, including instructions on reasonable doubt. (CALCRIM Nos. 200, 220, 226.) Among other things, the trial court instructed: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all of the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." Written copies of the final standard instructions were provided to the jury.

A jury found defendant guilty of sexual penetration of a child under the age of 10 years (Pen. Code, § 288.7, subd. (b) -- count 1)¹ and lewd and lascivious acts on a child under the age of 14 years (§ 288, subd. (a) -- count 2). The trial court sentenced defendant to 15 years to life on count 1 and eight years on count 2, stayed pursuant to section 654. The trial court imposed various fines, fees, and assessments, including a \$10,000 restitution fine (§ 1202.4), and awarded defendant 1,690 days of presentence credit.

¹ Undesignated statutory references are to the Penal Code.

DISCUSSION

I

Defendant contends the trial court's comments about the box and the reasonable doubt standard amplified the reasonable doubt instruction, lowered the prosecution's burden of proof, and denied him due process.

"The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid [instructing in such a way] as to lead the jury to convict on a lesser showing than due process requires." (*Victor v. Nebraska* (1994) 511 U.S. 1, 22 [127 L.Ed.2d 583, 600] (*Victor*).) Where a court has misdefined the reasonable doubt standard in a manner that improperly lowers the prosecution's burden of proof, reversal is required. (*People v. Aranda* (2012) 55 Cal.4th 342, 365.) An instruction that effectively lowers the prosecution's burden of proving guilt beyond a reasonable doubt is structural error because it vitiates all the jury's findings and its effect on the verdict is unquantifiable. (*Ibid.*) But, not every instructional error defining reasonable doubt is structural, most are subject to harmless error review. (*Id.* at pp. 365-366.) To determine whether the error is structural, "we ask whether the error rendered the trial 'fundamentally unfair or an unreliable vehicle for determining guilt or innocence' [citation], or whether the effect of the error is 'necessarily unquantifiable and indeterminate' [citation]." (*Id.* at p. 366, italics omitted.) That is, we assess " 'whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on' insufficient proof. ([*Victor*,] at p. 6.)" (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 840.)

We determine the correctness of jury instructions from the entire charge of the court, not from parts of an instruction or from a particular instruction. (*People v. Carrington* (2009) 47 Cal.4th 145, 192, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385].) The Constitution does not require particular words in instructing the jury on the burden of proof, but it does require that, taken as a whole, the instructions

correctly convey the concept of reasonable doubt. (*Victor, supra*, 511 U.S. at p. 5.) “We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation.” (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.) In addition, we assume jurors are intelligent and capable of understanding and correlating the instructions given. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

Here, the temporary judge provided initial instruction using the standard jury instructions, including an instruction on reasonable doubt. The assigned trial judge then added the challenged comments. Although creative efforts at explaining the reasonable doubt standard are not encouraged (*People v. Johnson* (2004) 119 Cal.App.4th 976, 986), we conclude the challenged comments were harmless. While the challenged comments probably did not help the jury understand the concept of reasonable doubt, there is no indication they prevented the jurors from doing their duty and following the other standard instructions given.

After the close of evidence, the trial court properly instructed the jury with final instructions. Those instructions mitigated any potential problems created by the court’s earlier comments. (*People v. Claxton* (1982) 129 Cal.App.3d 638, 669 disapproved on other grounds by *People v. Fuentes* (1998) 61 Cal.App.4th 956, 969, fn. 12.) The final instructions were most likely in the minds of the jury during their deliberations (*People v. Garcia* (1975) 54 Cal.App.3d 61, 70), particularly because the jury received a copy of those instructions in writing. When oral instructions conflict with written instructions, the written instructions control. (*People v. Mills* (2010) 48 Cal.4th 158, 201.) In light of the entire instructional charge, it is not reasonably likely that the jury understood the challenged comments to allow conviction based on insufficient proof.

II

The People have identified a clerical error in the abstract of judgment. The record on appeal only includes an abstract of judgment for the indeterminate sentence, which

improperly includes the determinate sentence imposed but stayed for the count 2 conviction. We will direct the trial court to correct the abstract.

III

At the sentencing hearing, defense counsel asked that the restitution fine be reduced to the statutory minimum of \$300 because defendant was indigent and any prison earnings would be de minimus. The People countered that the fine was not subject to consideration of ability to pay. The trial court ordered defendant to pay a \$10,000 restitution fine (§ 1202.4, subd. (b)(2)) based on the seriousness of the offenses and to be consistent with the sentencing of similarly-situated defendants. It also ordered defendant to pay an \$80 court security fee (§ 1465.8, subd. (a)) and a \$60 criminal conviction assessment (Gov. Code, § 70373).

In a petition for rehearing, defendant asserted for the first time that he is entitled to remand for a determination of his ability to pay the fine and fees imposed by the trial court, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157. The Attorney General filed an answer to the petition for rehearing arguing the contention was raised too late (i.e., for the first time in the petition for rehearing), it was forfeited because it was not asserted in the trial court, and there was evidence in the record that defendant had the ability to pay.

We address the merits of the contention because defendant asserted his inability to pay at the sentencing hearing. (See *Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 338, fn. 10 [appellate court has discretion to address issues raised in a petition for rehearing].) The trial court did not make a determination of defendant's ability to pay the fine and fees imposed, but it did conclude defendant could not pay for the presentence report (§ 1203.1b), the booking fee (Gov. Code, § 29550), or attorney fees (§ 987.8).

The Attorney General nevertheless argues remand is unwarranted because defendant will have an opportunity to work in prison and those wages may be considered in determining defendant's ability to pay. Although the Attorney General argues able-

bodied prisoners are required to work and are to be compensated for that assigned work, there is no evidence how this applies to defendant specifically. Under the circumstances, we will remand for a determination of defendant's ability to pay the fine and fees imposed by the trial court.

DISPOSITION

The matter is remanded for a determination of defendant's ability to pay the fine and fees imposed by the trial court. The judgment is otherwise affirmed. The trial court is directed to correct the indeterminate abstract of judgment by deleting the reference to the determinate sentence imposed but stayed for count 2, and to prepare a determinate abstract of judgment reflecting the determinate sentence imposed but stayed for count 2. Upon determination of defendant's ability to pay the fine and fees, the trial court is further directed to send a certified copy of the corrected (and if appropriate, amended) abstracts of judgment to the Department of Corrections and Rehabilitation.

MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

DUARTE, J.